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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,

and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Receiver's brief does not dispute SIPC's statutory analyses which show that Congress meant to vest the Commission with exclusive enforcement power over SIPC *via* section 7(b) and other provisions. Disdainfully bypassing those analyses as "plausible arguments skillfully presented" (Rec. Brief, p. 12), the Receiver's tactic is (a) to wring out of the purported facts of this case a baroque critique of the statutory apparatus, and (b) to motivate

this Court to perfect the work of Congress by a public distribution of supervision under the guise of discerning a congressional "implication" of a collateral private enforcement remedy. There is no substance or relevance to the critique (discussed below). But more important, the Receiver's brief fails to suggest a basis for implication beyond (a) the broad protective purpose of the 1970 Act, which was hardly unknown to Congress when it drew its statutory plan, and (b) the inclusion among SIPC's general corporate powers of a boilerplate provision that it may "sue and be sued". Reliance upon the concept of "implied" remedies in this case is a euphemistic request for judicial legislation.

Whether the Commission or SIPC have performed well under the 1970 Act, either generally or in this case, requires evaluations and judgments for which this appeal is hardly an appropriate vehicle. Moreover, speculation in that area would be relevant to congressional wisdom which only Congress can review, not congressional intent which is the issue at bar. Nevertheless, brief comment on the Receiver's innuendoes seems appropriate.

The Receiver does not suggest that the Commission or SIPC has a history of recalcitrance or caprice under the 1970 Act.[1] His rhetoric is predicated solely upon the

1. The record is quite the contrary. To date 111 firms have been placed in liquidation by SIPC. Some of those cases involved thousands of customers. See, *e.g.*, SIPC's Brief, p. 21 n. 68. But SIPC has provided protection in numerous situations involving relatively few customers. Thirty-seven cases involved only seventy-five or fewer customers. Of those, twenty-three involved fifty or fewer customers, and four involved less than ten. Except for this case and two others which presented an issue which should never again arise [Lohf v. Casey, 466 F. 2d 618 (10th Cir. 1972) and Bohart-McCaslin Ventures, Inc. v. Midwestern Securities Corp. 352 F. Supp. 937 (N.D. Tex. 1973)], SIPC has not declined to invoke the 1970 Act in any case actually involving customer loss except in five situations where the broker-dealer's registration with the Commission had been terminated prior to the discovery of customers' losses. Such termination *ipso facto* ended each firm's membership in SIPC thereby placing its customers outside SIPC's statutory authority to protect customers of its "members" only. The Commission and SIPC have solved the problem by a procedure whereby the Commission will restore registered status to these firms for the limited purpose of SIPC membership, thereby enabling SIPC to initiate a Liquidation Proceeding for the protection of customers. In all only about thirty-nine customers are involved, and SIPC's administrative costs will far exceed the dollar amount of the protection to be afforded.

pleadings in this case. Extrapolating from those pleadings he conjures a situation in which securities customers with alleged "rights" under the 1970 Act have been denied protection by SIPC's decision not to initiate a Liquidation Proceeding, and the Commission's decision not to proceed against SIPC under section 7(b). However, those pleadings actually reveal that neither caprice nor oversight accounts for SIPC's determination. It has several bases under the 1970 Act for declining to initiate a Liquidation Proceeding (SA 31-37). The Court of Appeals rejected only one. Moreover, the Receiver too facilely assumes that deposits to cover receivership expenses are losses which the 1970 Act protects.[2] As an added fillip the Receiver suggests that SIPC was guilty of bureaucratic delay, which this record does not support (SA 24-28, 38-40, 63, 67). Underlying the Receiver's position is the naked assumption that the 1970 Act should have been invoked, a conclusion with which both SIPC and the Commission have been unable to agree.

Shorn of its forensic embellishments the Receiver's position is that both SIPC and the Commission may err, and that Congress could not have "foreclosed securities inves-

2. Understandably, the Receiver has exhibited some unfamiliarity with the provisions of the 1970 Act. Thus, when his attorney first contacted SIPC he asked that his letter be treated "as a claim on behalf of the Receiver" (SA 25) and that funds be advanced to him to satisfy claims (SA 24-27). At least some of the depositors were the issuers of bonds for which Guaranty Bond acted as underwriter (SA 70). SIPC's main brief (at page 14) touches upon the somewhat technical parameters of customer protection.

tors from asserting their own rights" (Rec. Brief, p. 17). Among the difficulties with that argument is that it speaks of foreclosing rights when the question is whether a right and a remedy were granted. In a very real sense customers have no rights under the 1970 Act except those which accrue as a result of a Liquidation Proceeding actually commenced. Before that occurs they may well have an interest in whether a proceeding is commenced, but the issue presented is whether by implication Congress intended them to possess the same supervisory instrument over SIPC which it specifically reserved to the Commission.

That either the Commission or SIPC may err, in the judgment of others, is hardly a basis for altering the congressional scheme. Congress was well aware that there is no institution of men immune to error when it entrusted the extraordinary enforcement remedy solely to the Commission. The Congress reposed such confidence in SIPC, perhaps partly because of the legislated composition of its board of directors, that it thought it "unlikely" the Commission would have to resort to the section 7(b) remedy.[3] In granting that remedy it selected the agency which helped draft and sponsor the 1970 Act, which possesses the requisite expertise and public responsibility, and which has no ax to grind for any objective other than the protection of investors in whose service it has labored for forty years. That both SIPC and the Commission will fail in their duties in the same situation is difficult to imagine, although obviously not an impossibility. Whatever the risks, however, Congress legislated a novel program and selected the guardians of its trust. It clearly did not "imply" that the investing public should also supervise that program, a decision which the briefs of the Commission and SIPC demonstrate is supported by obvious important policy considerations.

3. See S. Rep. No. 91-1218, 91st Cong., 2d Sess. 15 (1970).

Insofar as prior decisions of this court may offer guidance here, the Receiver cites *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964), as "more nearly in point than *Amtrak.*" (Rec. Brief, p. 20). SIPC of course disagrees. The *Borak* case is distinguishible on at least two significant bases. First, unlike *Amtrak,*[4] *Borak* did not involve the supervision of a federally chartered corporation. The Commission's brief (at pages 6-8) quite properly notes that *Borak* and a related line of cases recognize a private remedy for the redress of a wrong done to the plaintiff in violation of law. The wrong in such cases involves the breach of substantive statutory duties, conduct which is effectively tortious in nature. Thus, Justice Harlan has observed:

> "The notion of 'implying' a remedy, therefore, as applied to cases like *Borak,* can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U. S. 388, 402n.4 (1971).

As can readily be gleaned from the authorities cited in such cases as *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191, 202 (1967) and *Ash* v. *Cort,* 496 F.2d 416, 421-422, 423 (3d Cir.), *cert. granted,* 95 S.Ct. 302 (1974), the *Borak* line of cases merely applies the ancient principle, rooted in the common law of England, that the law will provide a remedy for injuries caused by a wrongful act. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, 39-40 (1916).[5]

4. Nat'l R. R. Passenger Corp. v. Nat'l Association of R. R. Passengers, 414 U.S. 453 (1974).

5. "The title of the act, repeated in that of each supplement, is general: 'An Act to Promote the Safety of Employees and Travelers,' etc.; and in the provisio to § 4 of the supplement of 1910

The second fundamental distinction, which relates primarily to rules of statutory construction, was well expressed in *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973):[6]

> "Appellants contend that the courts should look not to the form of the statute but to the social objectives sought to be furthered by it, and they argue that only through private rights of action can meaningful consumer protection against fraud and deceptive advertising be achieved. Similar contentions have been relied upon in other cases. But in the case at bar this court's latitude for judicial constructs is limited. We are considering an Act in which ends and means, the social ends to be fostered and the administrative means of achieving those objectives,

there is a reservation as to 'liability in any remedial action for the death or injury of any railroad employee.' None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee: but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted. (citing cases) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, 'Action upon Statute' (F), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (*Per* Holt, Ch. J., Anonymous, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Bl. Com. 51, 123; Couch v. Steel, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170. The inference of a private right of action in the present instance is rendered irresistible by the provision of § 8 of the act of 1893 that an employee injured by any car, etc., in use contrary to the act, shall not be deemed to have assumed the risk, and by the language above cited from the proviso in § 4 of the 1910 act." 241 U.S. at 39-40.

6. In *Holloway* the court refused to recognize a private remedy for violations of false advertising proscriptions in the Federal Trade Commission Act. It held that the Act vested the Commission with the exclusive right to correct violations.

> are inseparably interwoven into a unified and comprehensive statutory fabric. Both are the product of a legislative balance which took into account not only consumer protection but also interests of the businesses affected, with particular concern for tempered enforcement, the orderly development of commercial standards, and freedom from multiplicious litigation."

In the instant case it is difficult indeed to perceive any "latitude for judicial constructs". There is hardly a basis in the mere fact that SIPC can "sue and be sued" among its other general corporate powers. Nor can a private enforcement remedy be said to have been implied solely because of the broad purpose of the 1970 Act to protect customers. Most legislative enactments are intended for someone's benefit, but it hardly follows that benefitted persons for that reason alone become enforcers of congressional policy.

The Receiver emphasizes that the "expressio unius" maxim as applied in *Amtrak* "must yield to clear contrary evidence of legislative intent" (Rec. Brief, p. 18). That is precisely what *Amtrak* held (SIPC's Brief, p. 27), and SIPC contends that not only is such evidence entirely lacking here, but that the exclusivity of the Commission's section 7(b) remedy is the only reasonable conclusion which can be reached after appropriate analysis and reflection. Indeed, the utility of the "expressio unius" maxim in this case is really to fortify an otherwise ineluctable result rather than to serve as a tool for the resolution of doubt.

* * * * *

Only brief response need be made to the Receiver's argument in support of his standing.

Essentially the Receiver relies upon his order of appointment, emphasizing his duty to protect creditors including customers. That order, obtained at the instance of the Commission, did not purport in terms to authorize the Receiver

to enforce creditors' rights against third persons not involving the property or rights of the corporation in receivership. Of course receivers are duty-bound to "protect" creditors, but SIPC has found no case in which that duty meant more than marshalling and preserving assets and choses in action *of the estate* for the benefit of creditors. Obviously, the purpose of a receivership such as this is to vest control in the court over the property and affairs of the subject firm, to the end that its responsibilities to creditors will be equitably discharged. This was a liquidating receivership which was ancillary to the Commission's injunction action under the federal securities laws.[7] A receiver is not the agent of any party to the litigation; he is an officer of the court. *Cf. United States* v. *Smallwood*, 443 F.2d 535 (8th Cir.), *cert. denied*, 404 U.S. 853 (1971).

No authority cited by the Receiver refutes the foregoing or supports his position. In *Davis* v. *Gray*, 83 U. S. (16 Wall.) 203 (1872), the receiver of a railroad brought suit to restrain an unlawful taking of the railroad's lands by the State of Texas. In *Booth* v. *Clark*, 58 U. S. (17 How.) 322 (1855), a receiver sought to recover funds held by the Secretary of the Treasury which were owed the firm in receivership. This Court's decision in *Caplin* v. *Marine Midland Trust Co. of N.Y.*, 406 U. S. 416 (1972), continues to appear controlling, and the Receiver's efforts to distinguish that case seem insubstantial. The decision dealt squarely with the powers of a receiver, and other considerations addressed by the Court were in response to arguments advanced by counsel.

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7. *See, e.g.* Securities and Exchange Comm'n v. Bartlett, 422 F.2d 475 (8th Cir. 1970); Lankenau v. Coggeshall & Hicks, 350 F.2d 61, 63 (2d Cir. 1965); Esbitt v. Dutch-American Mercantile Corp., 335 F.2d 141 (2d Cir. 1964); Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Comm'n, 285 F.2d 162, 182 (9th Cir. 1960); Securities and Exchange Comm'n v. Fiscal Fund, Inc., 48 F. Supp. 712 (D. Del. 1943).

At the close of his brief, the Receiver stresses his earnestness in pressing this cause at the risk of being superseded by a trustee designated by SIPC. That is a risk he declined to invite for four months until he had substantially completed his work. Had he been as diligent right after his appointment when he was aware of the 1970 Act (SA 19), some of the serious complications which exist in this most unusual case might have been avoided.

CONCLUSION

The Commission's section 7(b) authority is the ultimate weapon in its arsenal of supervisory powers over SIPC. There is no basis for believing that Congress intended by implication to place in private hands a weapon with such potential for serious adverse effect on the public interest if improvidently used or brandished.

Respectfully submitted,

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